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"SUBSTANTIAL CAUSES FOR LOCAL UNPOPULARITY OF FEDERAL COURTS."

Ex-President Taft in his address before the American Bar Association on "The Selection and Tenure of Judges," exhibits the judicial frame of mind that shone in his career as a judge and made its impress upon his acts as our president. This address is a distinct contribution to legal literature and leads to the belief that his presidency of the American Bar Association has been tendered graciously, because, more than any other man in the public eye, he represents the thought of the best minds of our profession on the subject of the dignity and independence of our courts.

Fair generally, as this address is in stating the arguments *pro* and *con* for an appointive bench with tenure for life or good behavior, he fails, in our opinion, to give the true reason for "the local unpopularity of federal courts."

He said: "The very office which they serve, that of neutralizing local prejudice, necessarily brings them more or less into antagonism with the people among whom such local prejudice exists." With the greatest respect for Mr. Taft we think, that this cuts no figure whatever in that local prejudice. It is deeper than this. It exists because the continuance of the diversity of citizenship jurisdiction is founded on a myth, or, at all events, the old foundation does not now exist.

It may have seemed to the fathers that there ought to have been some reservation of the right to legislate about this in the beginning, just as it seemed wise to forbid any law impairing the obligation of contracts. The constitution was giving hostages to the future, because jealous states were trying a new experiment in government. It needed bracing on all sides, and especially did it seem desirable that looked-for immigrants to populate our wastes should be assured of protection in all their rights. It was never dreamed that a federal court would be called upon to declare any different law for an alien or a non-resident than the resident enjoyed. It would be to charge the states with bad faith *inter sese* to so think as to non-residents, and yet aliens were to have the same and no greater privileges than non-residents.

We think the trouble is just this: The federal courts, either lawfully or unlawfully, act in alien and non-resident cases independently of state courts. If this is lawful, then the Constitution has erected an alien institution for the supposed protection of alien interests, instead of an assistant jurisdiction to give aliens and non-residents the same protection, no more and no less, as that accorded to residents. If the latter was contemplated by the Constitution, there has been usurpation of authority by the federal courts for several generations.

This is a kind of a question that cannot die out, because there is an *imperium in imperio* that continually flaunts its claims in the face of the state and makes the resident see that his own state treats him unjustly or this power above the state treats him unjustly. He is more apt to believe that the latter does this, because its strokes are but exceptional afflictions in the course of the administration of law, while the state courts establish what they do in the usual way of courts in their ordinary jurisdiction.

This being the situation, it comes naturally to the apprehension of residents that the state unjustly is under the heel of the federal government in dealing with the general civil rights of its citizens. Local prejudice, therefore, is always dormant and easily aroused.

Federal judges, therefore, occupy a most delicate position. They tell localities, in effect, that their courts may be good enough for those who live there, but they are not good enough for non-residents and aliens, but that justice pure and undefiled drips only from the eaves of the sanctuaries of

federal jurisdiction. It is easily to be imagined that diplomacy could find no harder role to play with success, than that of making localities satisfied with taking away from their citizens what their own courts allow when these citizens deal with each other.

How much worse is the situation when some of the federal judges, entrenched in life tenure, cast all diplomacy to the winds and rule with severe, but impartial, severity along the lines of justice mapped out, even with Solomonic wisdom, by themselves? Rules of law, of themselves however perfect, can bring but a modicum of justice to anybody, if they undermine the principles any state insists upon for itself, and which govern, save exceptionally, as some power independent of it otherwise directs. Abstract justice is the uttermost hope of such a power and circumstances may make even this destructive of its every aim.

The fair, judicial mind of our Ex-President, enriched as it has been by experience on the executive and judiciary side of our government, ought to lead him to do great things towards bringing about team work between federal and state courts in the reform of judicial procedure. He knows there is friction and he knows, for he says so, there is "local unpopularity for federal courts." He knows what a tremendous advance it would be in this country to have uniform legal right in all states of this country, and he knows that difference in legal right in localities, because of federal and state jurisdiction over the same things, makes the former impossible to attain. Is there no balm in Gilead for such a sore?

The lawyer of this age who does most to lessen the different opposing rules or principles governing the same state of facts, because of the diverse jurisdictions in which the law governing them is declared, will go far to make his name an imperishable heritage. History would write the epitaph for him, the Roman poet claimed for himself:

"Exegi monumentum aere perennius."

It could be aptly said he expelled the chill of foreign atmosphere from our national courts and warmed its portals with the rays of a sun equally beneficent to all.

N. C. C.

NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE—TAKING ADVANTAGE OF A LAWYER'S INEXPERIENCE AS GROUND FOR NEW TRIAL.—If the number of moves in the game of chess can be said to be innumerable, the kaleidoscope changes in the prosecution of a law suit may be said to be incalculable. Something new is always turning up and the occasion for this observation is a motion for a new trial recently filed in the city of Portland, Oregon, in the case of Perius v. Portland Lumber Co.

This was an action for personal injury, wherein the plaintiff sought to recover from the defendant the sum of $20,000. Mr. M. J. MacMahon, of this city, was the attorney for the plaintiff. At the trial of the case, however, there appeared with him a younger attorney and, as stated in the motion, we assume this was his first effort. The trial proceeded in the ordinary course, Mr. MacMahon trying the case and when it came time for argument, the young attorney made the opening address. His address consumed in actual time not to exceed three minutes and he was so confused by the new situation that he could not make himself intelligible to the jury and abruptly ended the agony by sitting down. Wilbur and Spencer, who were defending this action, immediately waived argument, greatly to the chagrin of Mr. MacMahon, the senior counsel for the plaintiff. Thereupon the court ordered a short recess before proceeding to instruct the jury and when court convened again, after this recess. Mr. MacMahon arose and asked, if it was a fact that he was to be prevented from addressing the jury. The court advised him that as the defendant had waived argument that that was the case, whereupon Mr. MacMahon inquired of the court if he would consider the proceedings just gone through by his co-counsel in fact, an argument. The court held that there had been an argument, or at least an attempted one, and that Mr. MacMahon could not address the jury. The jury rendered a verdict in favor of the plaintiff for $750.00, whereupon a motion for a new trial was filed, and among the reasons assigned, we note the following:

"The surprising and unexpected collapse, temporary paralysis and cataleptic condition of the otherwise learned counsel who, when called upon to deliver the opening address to the jury on behalf of the plaintiff, in this, his first case in court, became bewildered, and at the opening of his prepared discourse, was compelled to abandon his efforts, and the unfair, ungallant and diffident advantage immediately taken of the unfortunate occurrence by the attorneys for the defendant in protesting against further argument, thereby depriving the plaintiff of his statutory privilege of addressing the jury at all, on the merits of his contention, by reason of said unavoidable, unforeseen and unpreventable occurrence, which in no way can be attributable to the fault, neglect or oversight of the plaintiff."

CONSTITUTIONAL LAW — STATUTE ABOLISHING SECRET ORDERS AMONG UNIVERSITY STUDENTS. — By Mississippi statute, all fraternities and sororities and secret orders among students of the University of Mississippi and all other educational institutions supported, in whole or in part, by the state are abolished. The statute further requires that no student upon entrance, while connected with such orders, shall affiliate with them during his studentship and shall file an agreement in writing with the chancellor, that he will not do so, attend their meetings, nor contribute any dues or donations to them. It was contended that constitutional rights are invaded by such a statute. Board of Trustees of University of Mississippi v. Waugh, 62 So. 827, decided by Mississippi Supreme Court.

In a suit to enjoin the enforcement of an order requiring applicants to sign pledges not to belong to any such orders, there was a demurrer, which the lower court overruled, and this ruling the supreme court reverses.

This court holds that attendance upon "the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right."

Is it altogether true that a statute may establish such institutions and provide for their maintenance by taxation upon the whole people, and by another statute impose purely arbitrary conditions upon the right, of an individual to apply for its benefits? This question seems to go to the root of the right to establish these institutions by means of public revenue. If an educational institution, not open equally to all, cannot be supported from public revenue, reasonable exactions upon entrance therein only are allowable.

But, we are far from saying this statute is not constitutional. Certainly the legislature may impose whatever there is reason to say will contribute to the efficiency of state institutions and the widest of latitude will be allowed to its discretion. As the court says, the act is quite the reverse of class legislation, but seeks to destroy the possibility of any class at the educational institutions maintained by the state. As long as it is reasonably debatable whether membership in these secret fraternities interferes or may interfere with proper discipline and equality among students, the statute would not be deemed arbitrary, and the Mississippi court would have been on safer ground in thus declaring.

COURTS AND LEGISLATION.

The Relation of Courts to Legislation Not a New Question—Let me begin with a quotation:

"There is no doubt but that our law and the order thereof is over-confused. It is infinite and without order or end. There is no stable ground therein nor sure stay; but every one that can color reason maketh a stop to the best law that is before time devised. The sublety of one serjeant shall make inert and destroy all the judgments of many wise men before time received. There is no stable ground in our common law to lean unto. The judgments of years be infinite and full of much controversy. The judges are not bound to follow them as a rule, but after their own liberty they have authority to judge, according as they are instructed by the serjeants, and as the circumstances of the case doth them move. And this maketh judgments and processes of our law to be without end and infinite; this causeth suits to be long in decision. Therefore, to remedy this matter groundly, it were necessary in our law to use the same remedy that Justinian did in the law of the Romans, to bring this infinite process to certain ends, to cut away these long laws, and by the wisdom of some politic

and wise men institute a few and better laws and ordinances."

Such are the words Starkey puts into the mouth of Reginald Pole in a dialogue submitted to Henry VIII. If in large part they have a familiar sound, and need only a dress of modern English to pass for a clipping from a recent periodical, an emanation of the American legal muckraker, it is partly because the relation of judging to lawmaking is a perennial problem and partly because that time was (as the present is also) a period of legislation following upon one of common law. In a later period of legislative activity, after an ineffectual attempt to reform the law and procedure of England, Cromwell was forced to say, referring to bench and bar, "the sons of Zeruiah are too hard for us." In still a later period of legislation, the period of the legislative reform movement, Bentham was wont to say that the law was made by "Judge & Company"—i. e. by the bench and bar—and to accuse the lawyer of chuckling "over the supposed defeat of the legislature with a fond exultation which all his discretion could not persuade him to suppress."

To-day the relation of courts to legislation has become a world-wide question, following the development of legislative lawmaking through modern parliaments. On the Continent, the last decade has seen the rise of a great juristic literature upon the subject. Whether, as in France, new demands are made upon old codes, which have acquired a settled gloss of doctrine and jurisprudence, or, as in Germany, the principles of a new code await juristic development at many important points, or, as in the United States, a rapidly growing body of written law is adjusting to a stable and none too flexible body of traditional principles, under one name or another, juridical method has become a chief subject of discussion. Even our problem of judicial power with respect to unconstitutional legislation has ceased to be local. With the adoption of a written constitution, the subject has become acute in Australia and Australian courts and lawyers are insisting upon the American doctrine in the face of a decision of the Privy Council in England to the contrary. If we bear in mind that the relation of courts to legislation is neither a new question nor a local question, we shall be able to look upon more than one aspect of the matter with greater equanimity.

The False Theory as to the Pre-Existence of Ideal Principles of Law to be Applied by the Courts.—According to the beautifully simple theory of separation of powers three wholly distinct departments have for their several and exclusive functions to make laws, to execute laws, to apply laws to controversies calling for judicial decision. It is a commonplace that a complete separation of this sort has never existed anywhere and that the lines, as we draw them in our constitutional law, are historical rather than analytical. But the theory itself, so far as it confines the judicial function to mere application of a rule formulated in advance by an extra judicial agency, proceeds upon an eighteen century conception of law and of law-making which we cannot accept today.

Jurists of the eighteenth century had no doubt that a system of law, complete in every detail, might be constructed for any country by any competent thinker by deduction from abstract principles. They thought of the legal system as a structure which might be built over again at pleasure in accordance with one's ideal of right. Hence their conception of legal science was a discovery and formulation of this ideal, as something unchangeable and independent of human recognition, whereby they might hand over to the legislator a model code, to the judge, a touchstone of pure law, to the citizen, an infallible guide to conduct. So long as men believed in this absolute natural law, they were justified in laying down that it was for the legislator to discover and enact this model code and for the judge simply to apply it. And even after they ceased to believe in it, two theories which had great currency served to keep

alive the resulting conception of the judicial function. One was the tradition of absolute legal principles, discovered and applied by courts, but existing prior to and independent of all judicial decision. Laid down by Blackstone, this notion that judicial decisions were merely evidence of law, or of that part of the law not evidenced by statutes, was accepted as a fundamental proposition. Austin characterized it justly as "the childish fiction, employed by our judges, that judiciary or common law is not made by them, but is a miraculous something, made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges." Historically, it represents the Germanic conception of law, the "sighing of the creature for the justice and truth of his creator," which, Heusler tells us, is to be found in every law book of the middle ages. Such a tradition, well established in the eighteenth century, lent itself at once to the juristic theory of that time and to the resulting theory of the judicial office. Moreover, it was reinforced presently from another quarter. After the historical jurists had overthrown the eighteenth century juristic theory, they acquiesced in a learned tradition on the Continent which confined historical study to the texts of the Roman law and they created a learned tradition in America which confined the jurist to the classical common law. Accordingly, ostensibly, the judicial function remained purely one of application. Men differed only as to what was to be applied. To some it was the command of the sovereign, expressed normally in legislation. To others it was natural law, which might at any time be revealed as a whole to the legislator and promulgated in a code. To others it was the principles of the common law, evidenced by prior decisions or declared by statutes. To others it was the body of legal principles implicit in the sources to which the learned tradition confined historical study and derived therefrom by legal reasoning. In any event it was assumed that the judge in every sort of case merely applied a rule which had a prior independent existence.

A German writer has put the received theory thus: The court is an automation, a sort of judicial slot machine. The necessary machinery has been provided in advance by legislation or by received legal principles, and one has but to put in the facts above and draw out the decision below. True, he says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine. It goes without saying that such a conception of the process of judicial decision cannot stand the critical scrutiny to which all legal and political institutions are now subjected. Men insist upon knowing where the pre-existing rule was to be found before the judges discovered and applied it, in what form it existed, and how and whence it derived its form and obtained its authority. And when, as a result of such inquiries, the rule seems to have sprung full-fledged from the judicial head, the assumption that the judicial function is one of interpretation and application only leads to the conclusion that the courts are exercising a usurped authority.

The true conclusion is rather that our theory of the nature of the judicial function is unsound. It is a fiction, born in periods of absolute and unchangeable law. If all legal rules are contained in immutable form in holy writ or in Twelve Tables or in a code or in a received corpus juris or in a custom of the realm whose principles are authoritatively evidenced by a body of prior decisions, not only must new situations be met by deduction and analogical extension under the guise of interpretation, but the inevitable changes to which all law is subject must be hidden under the same guise. To-day, when all recognize, nay insist, that legal systems do and must grow, that legal principles are not absolute,

but are relative to time and place, and that juridical idealism may go no further than the ideals of an epoch, the fiction should be discarded. The analytical jurists did a great service to legal science when they exposed this fiction, though their conclusion that a complete code should be enacted in order to put an end to the process of judicial law-making, shows that they saw but half of the truth. For the application of law is not and ought not to be a purely mechanical process.

Judicial Discretion and Judicial Law Making—Laws are not ends in themselves; they are means toward the administration of justice. Hence within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties. Any considerable narrowing of these limits, any confining of the judicial function by too many hard and fast rules soon defeats the purpose for which law exists. Application of law must involve not logic merely, but a measure of discretion as well. All attempts to eradicate the latter element and to make the law purely mechanical in its operation have ended in failure. Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause. "Whoever deals with juristic questions," says Zitelmann, "must always at the same time be a bit of a legislator;" that is, to a certain extent he must *make* law for the case before him.

Analyzing the Judicial Function—Our first step, then, in considering the relation of courts to legislation, must be to analyze the judicial function.

Judicial decision of a controversy, the facts being ascertained, has been said to involve three steps: (1) finding the rule to be applied, (2) interpreting the rule, (3) applying the rule to the cause. The first process may consist merely in laying hold of a prescribed text of code or statute, in which case it remains only to determine the meaning of the rule and to apply it. Here, commonly, the first process involves choice among competent texts or choice from among competing analogies, so that the several rules must be interpreted in order that intelligent selection may be made. Often such interpretation, using the term to mean a genuine interpretation, shows that no existing rule is adequate to a just decision and it becomes necessary to provide one for the time being. The rule so provided may or may not become a precedent for like cases in the future. In any event, this process has gone on and still goes on in all systems of law, no matter what their form and no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical.

Perhaps the classical instance of the process referred to is found in article 5 of the French Civil Code. That article reads as follows: "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision." Its purpose was, as we are told by an authoritative commentator, to prevent the judges from forming a body of case law which should govern the courts and to prevent them from "correcting by judicial interpretations, the mistakes made in the law." After a century of experience in the endeavor to carry out this purpose, French jurists are now agreed that the article in question has failed of effect. To-day the elementary books from which law is taught to the French students, in the face of the code and of the Roman tradition, do not hesitate to lay down that the course of judicial decision is a form of law.

All of the three steps above described are commonly confused under the name of interpretation, because, in primitive times, when the law is taken to be God-given and unchangeable, the most that may be permitted to human magistrates is to interpret the sacred text. The analytical jurists first pointed out that finding a new rule and interpreting an existing rule were distinct processes, and Austin distinguished them as spurious interpretation and genuine interpretation respectively, since his belief in

the possibility of a complete body of enacted rules, sufficient for every cause, led him to regard the former as out of place in modern law. Indeed he was quite right in insisting that spurious interpretation *as a fiction* was wholly out of place in legal systems of to-day. But experience has shown, what reason ought to tell us, that this fiction was invented to cover a real need in the judicial administration of justice and that the providing of a rule by which to decide the cause is a necessary element in the determination of all but the simplest controversies. More recently the discussions over the juridical handling of the materials afforded by the modern codes has led continental jurists to distinguish application of rules to particular causes from the more general problem of interpretation. Indeed, under the influence of the social philosophical and sociological jurists, who have insisted that the essential thing in administration of justice according to law is a reasonable and just solution of the individual controversy, application of law has become the central problem in present day legal science.

Given the three steps in the decision of causes, as courts now proceed, namely, finding of rules, interpretation of rules, and application to particular controversies of the rules when found and interpreted, let us consider the relation of the courts to legislation with reference to each.

Finding the Law—It has been a favorite action of legislators that the finding of law could be reduced to a simple matter of genuine interpretation; that a body of enacted rules could be made so complete and so perfect that the judge would have only to select the one made in advance for the case in hand, interpret it and apply it. As has been said, this was the eighteenth century idea. Thus, in the code of Frederick the Great, the "intention was that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a royal commission as to any doubtful points, and to be absolutely bound by their answer. This stereotyping of the law was in accordance with the doctrines of the law of nature, according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could, therefore, be laid down once for all, so as to be available for any possible combination of circumstances." Bentham and Austin, who saw clearly enough that the doctrine of natural law of the eighteenth century was untenable, none the less had the same idea of the possibility of a perfect code, self-sufficient and adequate to every cause. Accordingly, Austin named as a fatal defect of the French Civil Code, what has proved to be the chief source of its success, namely, that it was not intended to be complete but was intended to be supplemented and explained by various subsidia.

As you know, the historical school overthrew the notion that there could be a complete and final legislative statement of the law. Unhappily, the historical jurists went too far in the opposite direction. They assumed that conscious human effort to shape and so to improve the law was futile. They conceived that the law developed through the development of the genius of a people and its gradual expression in legal institutions. Hence they took it to be the duty of the jurist to study the course of this development and to trace its effects in existing legal systems, but in nowise to attempt to interfere therewith, since to essay conscious law-making was to attempt the impossible. For many reasons this theory became very popular in America, and to a large extent it still holds its ground with us, after it has been rejected elsewhere in consequence of the rise of the social philosophical jurists. Thus we have two conflicting theories of the relation of courts to law-making. On the one hand, the older analytical theory, heir in this respect to the eighteenth century, holds that a complete

legislative statement of the law upon any subject may be made in advance, and that judicial law-making is abnormal and due only, so far as it may be justified, to defects in the legislative prevision. On the other hand, the historical theory regards such legislative attempts as useless, as attempts to make what cannot be made, and hence looks upon development of the law by juristic speculation and judicial decision as the normal and on the whole the only practicable method. Neither of these theories expresses the whole truth. But the rise of modern legislation and resulting imperative notions of law serve to keep alive the former, while the exigencies of administering the modern codes upon the Continent and experience of applying modern statutes in England and America serve to keep alive the latter, in one form or another, as a tenet of the legal profession. For instance, it is justly thought a merit of the new German Civil Code that it makes no attempt to be a perfect code in the eighteenth century sense. But there are German expositors of the code who object to its generality and to the margin for development which it leaves and accuse it of being a mere institutional text book.

In truth, the changed attitude toward legislation involved in the break-down of Savigny's historical school, much as it is to be welcomed, in that it gives us much needed faith in the efficacy of effort in improvement of the law, is bringing about a return to absolute theories of law-making which in more than one respect is unfortunate. It has been said truly that the activity of legislatures is a fundamental fact of modern law. Demon will legislate, and any theory that seeks to put a check upon this activity will dash in vain against obstinate facts. But it is no less true that much, if not most, of this legislative activity will prove futile, as most of it has proved in the past, so long as it proceeds upon the assumption that legislators may lay out a full and complete scheme in advance, which will suffice for all controversies, so long as it assumes that the general principles of the law and the rules and doctrines of the legal system into which the legislative enactment is to be fitted and in which it must take its place, may be neglected, and so long as it proceeds upon the idea that arbitrary expressions of the sovereign will may be given the quality of law by a prefatory "be it enacted." A lesson of legal history which must be learned both by legislators and by courts is that the law-maker must not be over-ambitious to lay down universal rules.

Necessity for a System in "Finding the Law"—Since the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions, it is obvious that the power of finding the law, which a tribunal must be allowed to exercise, is to be governed by some sort of system, or we shall have a personal, rather than a legal, administration of justice. The first conscious attempt to provide such a system is usually a complete scheme of legislation. But such schemes are soon outgrown and are never wholly sufficient. Hence three purely juristic methods of systematizing the judicial finding of law have arisen. (1) First we may put what has been called a jurisprudence of conceptions. Certain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process. The merit of this method is that it leads to certainty, and whenever, as in the nineteenth century, the demands of business and of property are paramount, this method is the prevailing one. (2) A second method is to take the rules of a traditional system or the sections of a legislative system as premises and to develop these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social conditions of the time being. Just now Continental legal literature is full of suggestions as to the manner in which such a method should be worked

out. (3) A third method is the purely empirical one of our Anglo-American law: as Mr. Justice Miller put it, the process of judicial inclusion and exclusion. This method, in appearance crude and unscientific, is none the less justified by its results. It is, in truth, the method of the natural scientist, of the physician and of the engineer, the method of trial-hypothesis and confirmation. The tentative results of a priori reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward and in time a new rule is developed. If the results are not just, a new line is taken, and so on until the best line is discovered. With all its defects, this method has stood the test of use better than any other. Speaking of this method and of its results in English law, Professor Kohler of Berlin, who must be pronounced the leader among modern jurists, says:

"Their science does not go beyond the few necessary beginnings, yet their administration of law far surpasses ours."

Wherein Legislation Is Important—If judicial finding of law cannot be obviated by any complete scheme of legislation and may be systematized sufficiently by known juristic methods, it would seem that legislation ought to seek chiefly to provide new and better premises from which courts may proceed rather than to tie the courts down rigidly by a mass of rules. This providing of new and better premises is a possible task and a needed one in all periods of transition. The slow growth of the law by judicial inclusion and exclusion and discovery of the sound rule at the expense of many litigants becomes intolerable in such periods. At many points a more rapid adjustment of the legal system to the needs of the community becomes imperative. Moreover, it happens too often in our Anglo-American case law that through overambition of our courts to lay down universal rules, our empirical method is replaced in many portions of the legal system by a jurisprudence of conceptions. In such cases, new premises may be required because society cannot await the gradual shifting process which would otherwise bring about a readjustment of the law. But two points are to be observed in this connection.

In the first place the legislator must bear in mind that his enactment will not stand alone. It must take its place in and become a part of an entire legal system. Hence he must not neglect the relation which his statute will bear to the general body of the law. Rules cannot stand alone in a legal system. So long as human foresight is finite and the variety of human actions infinite, legal reason must be the measure of decision of a great part of the causes that come before courts. This legal reason, exercised in one of the three ways we have considered, postulates a system of rules or principles. Disturbance of this system produces corresponding disturbance of the course of legal reasoning, and sooner or later the disturbing element yields to the general system or else the system gives way thereto. In any event, nothing has so profound an effect upon the practical workings of an enactment as its relation to the legal system into which it is to be set and the mode in which its adjustment thereto has been studied and provided for. This is a matter of much more moment than provision for every detail of application that may be foreseen.

The second point to observe is that this legitimate function of judicial adjustment of legislation to its surroundings in the legal system is liable to abuse and has been abused in American law in the immediate past. The old law and the new element ought to be and in the end must be made to accord in a legal system. But this does not mean that the new element is to be judged with suspicion, to be held down rigidly to the mere letter of its provisions, and to be distorted by the reading into it of all the dogmas of the old law not inconsistent with its express terms. Unhap-

pily, a tendency of this sort was manifest at one time and has not wholly disappeared. Many things combined to produce such a tendency in the nineteenth century. American law; the poor quality of much of our state legislation, the analytical theory that law is made and its American form that law is what the courts decide it to be, the relations of judge and legislator in a system in which the judiciary in finding the law may test the validity of statutes by constitutional provisions, the traditions of a legal system which preserved many memories of the German conception of a body of rules beyond reach of human change, and above all a notion of the finality of common law doctrines derived in part from the Germanic tradition and in part from the latter conception of natural law, and fortified by the doctrine of the historical school as to the futility of conscious law-making. Most of the friction between courts and people has been due to this notion of the finality of the law on the one hand and the notion of the finality of legislative power on the other hand.

Analyzing the "Natural Law" Conception—Let us look at this feature of the relation of courts to legislation more closely.

Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is chiefly historical. Our professional thinking upon juristic subjects is almost wholly from the point of view of eighteenth century natural law. In either event, it begins and ends substantially in Anglo-American case law. Understand me, I do not for a moment underrate this inheritance of judicial experience in the adjustment of individual relations and disposition of concrete disputes. But I deny that it contains anything beyond such experience in any other sense than all experience may be made to disclose principles of action. Yet our jurists of both schools, have claimed much more for it. It has been shown more than once that our historical school has given us a natural law upon historical premises. It has made the fundamental conceptions of all legal science. Thus it has set up a fixed, arbitrary, external standard by which all new situations and new doctrines are to be tested. This school has had an almost uncontested supremacy in our legal scholarship. In the profession at large and in the law schools dominated by the practitioner, substantially the same results in juristic thinking is reached in another way. Except as they have come from the halls of a few of our great law schools, lawyers and judges have been trained to accept the eighteenth century theory of natural law. Until a date comparatively recent, all legal education, whether in school or office, began with the study of Blackstone. Probably all serious office study begins with Blackstone, or some American imitator to-day. Our latest and most pretentious institutional book lays down the natural law conception without a hint that any other might be tenable. Some law schools still make Blackstone the first subject of instruction. In others, Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses in so-called elementary law, in which texts reproducing the juristic theories of the eighteenth century are the basis of instruction.

The Danger of the "Natural Law" Conception—Thus scholar and lawyer have concurred in what became for a time a thoroughgoing conviction of the American lawyer, that the doctrines of the common law are part of the universal jural order. When he spoke of law, he thought of these doctrines. He held that constitutions and bills of rights are declaratory of them. He construed statutes into accord with them. Through the power of the courts over unconstitutional law-making, he forced them upon modern social legislation. When, to use the words of Bracton and of Coke, he reminded the sovereign people that it ruled under God and the law, he meant that these doctrines which were conceived of as going back of all constitutions and beyond the reach of legislation, were to be the

measure of state activity. But the fundamental conceptions of Anglo-American case law are by no means those of popular thought to-day. Being alien in many particulars to current notions of justice and often out of touch with the economic and social thinking of the time, it is not likely that these principles would be acquiesced in wholly, even if there were no positive force to counteract them. Such a force there is. For the popular theory of sovereignty, what one may call the classical American political theory, is quite as firmly rooted in the mind of the people as the eighteenth century theory of law is rooted in the mind of the lawyer. The layman is taught this political theory in school, he reads it in the newspapers, he listens to it on the Fourth of July and from the stump and from Chautauqua platforms, and he seldom or never hears it questioned. In consequence, he is as thoroughly sure of it as is the lawyer of his juristic theory. If the lawyer is moved to stigmatize all that does not comport with his doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation.

While the lawyer believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made, the people believe no less firmly that it may be made and that they have the power to make it. While to the lawyer the state enforces law because it is law, to the people law is law because the state, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but a formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. While the lawyer thinks of popular action as subject to legal limitations running back of all constitutions and merely reasserted, not created, thereby, the people think of themselves as the authors of all constitutions and limitations and the final judges of their meaning and effect. This conflict between the lawyer's theory and the politician's theory weakens the force of law. The lawyer's theory often leads him to pay scant attention to the legislation or to mold it and warp it to the exigencies of what he regards as the real law. But to those who do not share his theory, this appears as a high-handed overriding of law, and the layman laboring under that impression, is unable to perceive why the lawyers should have a monopoly of that convenient power. On the other hand, the people's theory that law is simply a conscious product of the human will tends to produce arbitrary and ill-considered legislation impossible of satisfactory application to actual controversies.

Abandoning the Idea of the Finality of the Common Law—Hence, I take it, absolute theories, derived from the eighteenth century are the principal source of friction in the relation of courts to legislation. Already the causes of this friction are disappearing, and the resultant difficulties in our legal system are going with them. More careful legislation, proceeding upon better lines and based upon better understanding of what legislation may achieve and should attempt on the one hand and the disappearance on the other hand of the notion of the finality of the common law are now things, if not of the present, certainly of the immediate future. And at the same time the judicial attitude toward legislation has changed visibly. Comparing the report of the decade from 1880 to 1890 with the reports of to-day, this change becomes very striking, and a progressive liberalization is manifest as one looks over the decisions from 1890 to 1910. On the whole, the movement is going forward more rapidly in the courts than in the legislatures, though some states here are conspicuous exceptions. Not a little modern social legislation, as it is too often enacted, will call for the highest powers of the strongest judges that can be put upon the bench, if we are to make it effective as part of a legal system.

Interpreting the Law—Turning now to interpretation, I must make it clear at the

outset that I refer to genuine interpretation, to a genuine ascertainment of the meaning of the legislative provision. This problem, however, is so closely connected with the more difficult one of application of the provision to the cause in hand that to some extent we may look at them together. In the past the whole complex of problems, finding a rule to apply, interpreting the rule when found, and applying it, has been called interpretation. This has led to an impression that all interpretation involves the legislative and personal element which belongs only to the finding of law. Hence the present popular demand that our courts go to the extreme in spurious interpretation of constitutional provisions while at the same time complaint is made that statutes are nullified by the ordinary process of finding and applying the law. We cannot keep before us too clearly that finding the law—if you will, judicial law-making—is one thing, and true interpretation quite another. In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial law-making or spurious interpretation is necessary unless we would have the court decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation. In the first decision upon the legal tender act, indeed, and in other cases occasionally, implied limitations upon legislative power have been derived by analogy. But such implied limitations, if they exist, must be implied in fact.

The idea of a prescriptive constitution, of principles running back of all governments of which bills of rights are but declaratory, is only another phase of the idea of natural law, and in its application means simply the finality of an ideal development of the fundamental principles of the common law. In many of our state courts this idea has been the bane of constitutional decisions upon provisions of the bill of rights. Indeed it has some warrant in the notions of those by whom the bills of rights were framed, and if these were statutory provisions, the position that they might be extended analogically as being declaratory of common law doctrines might be well taken. For our bills of right represent the eighteenth century desire to lay down philosophical and political and legal charts for all time, proper enough in men who believed they had achieved finality in thought in each connection. The first period of our constitutional law was under the influence of these ideas. But legislatures at that time were willing to be guided by the prescribed charts and would have conformed thereto had there been no such constitutional provisions. The chief complaint during this period was that the courts extended the possibilities of governmental action by interpretation—for example that they allowed the federal government to do much which it was denied the constitution had granted thereto. Later, a period of vigorous legislation upon social subjects began and the complaint changed. Now it is urged that the interpretation of courts is too narrow, that legislatures, state and national, are shorn of the powers that belong to them. What has happened is this. Experience has shown, as judicial experience has always shown, the unwisdom of hard and fast enactment. The eighteenth century political and legal charts have been found unsuitable. We have found, that after all, a bill of rights was wisely omitted from the original draft of the federal constitution. Such provisions were not needed in their own day, they are not desired in our day. It is true they have been aggravated to some extent by taking them to be declaratory and then reasoning from assumed first principles instead of applying the provisions themselves. But that practice has been disappearing with the wane of the idea of the finality of the common law, and the current reports show that with a few conspicuous exceptions, both federal and state tribunals are definitely rejecting it.

Consequently it is a misfortune that at the very time when spurious interpretations is thus losing its only foothold in judicial interpretation of constitutions, there should be a strong public demand for elimination or mitigation of undoubted restrictions by a process of spurious interpretation, on the theory that direct amendment is impracticable.

Spurious versus Legitimate Interpretation—The fiction involved in calling the judicial process of finding the law by the name of interpretation leads to just such mischiefs. It gives rise to an aversion to straightforward change of any important legal doctrine. The cry is *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it." Thus an unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

Three Stages of Judicial Interpretation—With respect to legislation proper, however, there is much yet to be done in the development of a better system of interpretation and application. Vandereycken finds three stages in the development of judicial interpretation. (1) The literal stage, is one in which the exact words taken literally are made the sole measure. (2) In the logical stage, the law is taken to be constituted by the will of the law-giver and respect for this will take the place of the respect for the formula which governed the preceding period. Most of our common law interpretation belongs to this stage. We conceive of genuine interpretation as an attempt by logical methods to ascertain the will of the author of the law. (3) In the positive stage, the law is regarded not so much as something proceeding from the will of the law-giver as something proceeding from society through him; as being the product of economic and social forces working through him and finding expression in his words. Hence the text and the context is no longer held to be an all-sufficient guide. Nor are the circumstances attending enactment held conclusive. Above all things it is held, regard must be had to the exigencies of social life, to the social ends to be served, to the effect of the different possible interpretations or applications upon the community to be governed thereby.

Sociological Interpretation of Law—Kohler, one of its pioneer advocates, has applied this method to the new German code, and his exposition deserves to be quoted. He says:

"Thus far we have overlooked most unfortunately the sociological significance of law-making. While we had come to the conviction that it was not the individual who made history but the totality of peoples, in law-making we recognized as the efficient agency only the person of the law-maker. We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of

the whole people, whose organ the law-maker has become."

It is significant that the Juristentag in Germany has already undertaken legal sociological inquiries with respect to the social effect of existing laws as the basis of proposed legislation, and that at least one German professor of law has for some time maintained a seminary devoted to studies of this type.

As has been said, our classical common law interpretation is of the second type. But something very like sociological interpretation has begun here in this country. The briefs submitted by Mr. Brandeis in the case of Muller v. Oregon and in the case involving the Illinois statute as to hours of labor for women, show what may be achieved in this direction. The present decision of the Supreme Court of Wisconsin on the Workmen's Compensation Law of that state shows that the good sense of our courts is leading them to develop some such a method for themselves.

With respect to interpretation, then, I take it our tasks are (1) to rid ourselves here also of absolute theories, and in particular of the remains of the dogma of finality of the common law; (2) to repeal what ought to be repealed directly and straightforwardly and not store up mischief for the future by demanding indirect repeal by spurious interpretation; (3) above all to develop a sociological method of applying rules and thence, if need be, of developing new ones by the judicial power of finding the law.

Denying to Courts the Power of Interpretation—A radically different view is finding favor with many laymen to-day and has been advocated by professors of government and political science. One of the latter has suggested recently that the power of interpretation should be taken from the courts and given to some executive body in supposed closer touch with the popular will, thus confining the courts to the task of applying the prescribed and interpreted rule. Perhaps enough has been said to show that interpretation apart from decision is impracticable, that it is futile to attempt to separate the deciding function from the interpretating function. But if the mere function of genuine interpretation were to be set off—and of course spurious interpretation is law-making and on theoretical grounds is no more proper for an executive commission than for a court and on practical grounds is obviously better exercised concretely than abstractly—how little should we accomplish. Professor Gray has put the matter very well thus: "A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised in the statute never occured to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present."

Moreover, this very experiment was tried in the code of Frederick the Great and failed utterly as was to be expected. For why should we hope that the executive commission would possess more foresight than the legislature? It is a lesson of all legal history that the most we may achieve in advance is to lay down a premise or a guiding principle and that the details of application must be the product of judicial experiment and judicial experience.

In a much quoted case of the fourteenth

century, counsel reminded the Court of Common Pleas that if it did not follow its own decisions no one could know what was the law. One of the judges interposed the suggestion that it was the will of the justices. "Nay," corrected the Chief Justice, "law is reason." In this antithesis between will and reason we have the root of the matter. Mere will, as such, has never been able to maintain itself as law. The complaint of our sovereign peoples that their will is disregarded must be put beside the querulous outburst of James I, "Have I not reason as well as my judges?" The attempt of Frederick the Great to put all interpretation of law in the hands of a royal commission, and the futile attempt of Napoleon's code to prevent the growth of a judge-made law. There is no device whereby the sovereign, whether King Rex or King Demos may put mere will into laws which will suffice for the administration of justice.

In Conclusion—To sum up, I think the difficulties involved in the relation of courts to legislation grow out of (1) overminute law-making which imposes too many hard and fast details upon the courts; (2) crude legislation, which leaves it to courts to work out what the legislature purported to do but did not; (3) absolute theories, both of law and of law-making, which lead both courts and legislatures to attempt too many universal rules, to attempt to stereotype the ideas of the time as law for all time, and have led courts at times to enforce too strongly the doctrines of the traditional system, at the expense of newer principles, and finally, (4), by no means least, insufficient attention to the problem of enforcement of rules after they are made. Enforcement and application are the life of law. But we have spent our whole energies upon making rules and have seemed to rely on faith that they would vindicate themselves. More than anything else, attention to procedure and to the enforcement of rules and their application in practice will relieve the present tension. The Puritan ideal of judicial machines bound down by a multitude of detailed rules has proved inadequate. If legal history may be vouched, the way out lies in strong courts with full powers of doing justice, guided by principles furnished by the law-giver, but not hampered by an infinity of rules, the full effect whereof in action no one can hope to forsee.

ROSCOE POUND.

Cambridge, Mass.

CONTRACTS.—PUBLIC POLICY.

MAISCH v. MAISCH.

(Supreme Court of Errors of Connecticut. July 25, 1913.)

87 Atl. 729.

A contract made pending an action for divorce agreeing on the alimony to be paid in case divorce be decreed, being valid at the time and place made, and not shown to have been intended or used for collusion or suppression of evidence, is not so contrary to the public policy of Connecticut as to be unenforceable in its courts.

Statement.

The plaintiff and her then husband, the defendant, while resident in South Dakota, there entered into a contract reciting that the plaintiff had commenced an action for divorce in a South Dakota court; that the defendant had appeared and answered; that it was desirable to settle their property affairs and rights independently of the divorce proceedings, and to agree upon the amounts to be allowed the plaintiff as attorney's fees, costs and alimony rather than submit these matters to the court for adjudication, leaving to the court the question only of whether the plaintiff was entitled to an absolute divorce. The contract then provided for the payment of agreed allowances and costs and of $20 a week, in the event of a decree being granted, during the defendant's life and until the death or marriage of the plaintiff. After the execution of the contract and on the same day a decree of absolute divorce was granted to the plaintiff. Plaintiff has not remarried and brings this action to recover damages for the defendant's neglect and refusal to make the payments required by the agreement. A demurrer to the

complaint on the ground that the contract was against public policy and void was overruled, (Gager, J.), and the defendant answered, denying that anything was due under the contract, and in a second defense again setting up that the contract was against public policy and void. It was not pleaded that the divorce proceedings were in fact collusive or fraudulent.

BEACH, J., (after stating the facts as above.) (1.) The principal question is whether the contract sued on is on its face, and without showing that it was in fact intended or used for collusion or suppression of evidence, so contrary to the public policy of Connecticut that it cannot support the judgment. It is everywhere agreed that contracts for the purpose of facilitating divorce are contrary to public policy, as where the agreement is to assist each other in obtaining the divorce. Palmer v. Palmer, 26 Utah, 31, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. Rep. 820. Or for the nonappearance of one of the parties, as in Belden v. Munger, 5 Minn. 211 (Gil. 169), 80 Am. Dec. 407; Adams v. Adams, 25 Minn. 72. Or where money is paid in consideration of the agreement of the wife to prosecute and sue for divorce, as in Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028. But there is a difference of opinion as to the validity of contracts made after divorce proceedings have been independently commenced or determined upon and where the agreement is in fact an amicable arrangement as to the amount of alimony to be paid in the event of a divorce being granted In some jurisdictions contracts of this general character are permitted and even favored. Burnett v. Paine, 62 Me. 122; Badger v. Hatch. 71 Me. 562; Snow v. Gould, 74 Me.. 540, 43 Am. Rep. 604; Warren v. Warren, 116 Minn. 458, 133 N. W. 1009; Randall v. Randall, 37 Mich. 565; Palmer v. Fagerlin, 163 Mich. 345, 128 N. W. 207; Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102. In other jurisdictions such contracts are held to be contrary to public policy. Lake v. Lake, 136 App. Div. 47, 119 N. Y. Supp. 686; Speck v. Dausman, 7 Mo. App. 165; Muckenburg v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Hamilton v. Hamilton, 89 Ill. 349; Seeley's Appeal, 56 Conn. 202, 14 Atl. 291.

According to the law of South Dakota, the contract in suit appears to be valid. By that law husband and wife may contract with each other respecting property, and they may agree in writing to an immediate separation. Code, §§98 and 99. In Burgess v. Burgess, 17 S. D. 44, 95 N. W. 279, a woman, after divorce, sued her former husband for specific performance of a contract to convey real property, made in contemplation of the divorce proceedings, in lieu of alimony. The court said: "The law of this state expressly permits contracts between husband and wife with respect to the property of each, but forbids certain agreements as collusive which are intended to alter or promote the dissolution of the relation of husband and wife. Contracts relating to alimony are being constantly made and enforced, while agreements which contravene the policy of the law in relation to granting divorces are everywhere regarded as illegal. * * * The plaintiff was not asked to commit, or to appear to have committed, any act constituting a cause for divorce. She was not asked to refrain from appearing in the contemplated action for divorce, nor does it appear that she ever agreed to refrain from making a defense. It is true that she did not appear, relying * * * on the defendant's express promise, and was thus deprived of an opportunity to have her property rights and the property rights of her daughter determined by the court. But it does not affirmatively appear, and we think it cannot be inferred, that she made any agreement as the consideration of receiving the land, which, if shown, would have required the court to deny to her husband a divorce on the ground of collusion." Such being the law of South Dakota, the contract was valid at the time and place when it was made and gave rise to an enforceable obligation. That being so, the obligation is enforceable here, unless its enforcement would contravene some important public policy of the state or the canons of morality established by civilized society. Minor on Conflict Law, p. 9.

That the contract was not contrary to any universally accepted code of morals is evident from the difference of opinion above pointed out. In determining whether foreign created rights, valid at the place of their origin, will or will not be enforced in another jurisdiction when contrary to some domestic public policy of the forum the courts are compelled, in the absence of statutory direction, to weigh the injustice of refusing the remedy against the importance of maintaining the domestic policy. "In deciding cases of this kind, therefore, each court has to pass upon the importance of the domestic policy maintained by its laws. They are generally loath to deny the enforcement of a proper foreign law and will not, if they consider the domestic of minor importance. But, where it is a fundamental and important policy of a state established after careful consideration of the sup-

posed needs and wants of its people no foreign law will be permitted to supersede it." Minor on Conflict of Laws, p. 11. "Not every common law or statutory rule prevailing at the forum involves a distinctive policy in the sense of the exception." Wharton on the Conflict of Laws, § 4a; Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; McKee v. Jones, 67 Miss. 405, 7 South. 348; Egbert v. Baker, 58 Conn. 319, 20 Atl. 466; First Nat. Bank v. Walker, 61 Conn. 154, 23 Atl. 696.

No unyielding principle can be invoked, but each case must be determined as a matter of comparative justice. In the present case the contract has been fully performed by the plaintiff; in reliance on the defendant's express agreement, valid where made, she has omitted to demand alimony from the court and has now lost her opportunity of doing so; there is no showing that the contract was actually made for the purpose of collusion or suppression of evidence, and no claim that the decree is for any reason invalid, so that nothing remains unperformed except a financial obligation which the defendant seeks to evade. The public policy of Connecticut is not invoked to prevent the doing or continuance of any act forbiden by our law, but as a token of our disapproval of a past transaction in South Dakota between residents of that state which was unobjectionable under their law. A disapproval, moreover, founded on a general objection to the making of such contracts and not upon any special objection to this particular transaction.

We think it clear that the state of Connecticut is not deeply concerned as a matter of public policy in reprehending this contract. The right of each state to determine as a matter of public policy the conditions upon which the marital relations of its citizens may be dissolved, is fully recognized; and it would seem that the same policy ought to control the validity of contracts made in view of pending divorce proceedings. It is no part of the public policy of Connecticut to be more careful than the state of Dakota itself in protecting the divorce courts of Dakota against collusion. We have assumed that the policy of the state of Connecticut is opposed to contracts between husband and wife made after divorce proceedings have been instituted and with a view of fixing by mutual agreement the amounts to be paid by the husband in lieu of alimony. It may be doubted perhaps whether the case of Seely's Appeal, 56 Conn. 202, 14 Atl. 291, goes quite to this length, for that decision is complicated by the fact that the wife was at the time of the contract legally incapable of contracting with her husband. It is also pointed out in Seeley's Appeal that the contract in that case was objectionable because the court was left to rest a decree upon evidence which did not include all the facts in the case. This objection goes to the root of the matter. Such contracts when made not to facilitate divorce, but solely as an amicable settlement of property affairs, and made in view of divorce proceedings already independently instituted or determined upon, are not necessarily contrary to public policy and void, unless concealed from the court. If submitted to and approved by the court with full opportunity for scrutiny before the decree, they are unobjectionable; but, if concealed from the court, they are contrary to public policy and will not be enforced unless in extreme cases where the refusal to do so would assist in the perpetration of an intentional fraud.

It does not appear whether the contract here in question was or was not concealed from the South Dakota court; but, as it was valid, there can be no presumption of any motive for concealing it. On the whole record, the contract is not violative of the public policy of this state as to prevent a recovery.

(2.) On the trial of the action the defendant introduced in evidence articles of separation made in New York between the plaintiff and the defendant in July, 1902, expressing the fact that the plaintiff and the defendant had agreed to live separate and apart. The defendant then offered in evidence a certified copy of all the proceedings in the South Dakota divorce suit for the purpose of showing that the plaintiff had testified before the South Dakota court in such proceedings that she had been deserted by the defendant. The evidence was claimed in support of the allegations of the second defense. The defendant also called the plaintiff as a witness and inquired whether she had testified in the divorce suit in South Dakota that her husband had deserted her and whether his living apart had been contrary to her wish and desire. All this evidence was objected to and excluded on the ground that the second defense contained no allegation of fact, and that the evidence was not relevant to any issue in the cause. Upon an examination of the pleadings, we think the evidence was properly excluded.

There is no error. The other judges concurred except WHEELER, J., who dissented.

NOTE.—*Validity of Agreements Between Parties to Pending Suit for Divorce as to Alimony.* —As is perceived by the instant case, the law as

to validity of contract to pay alimony, if divorce is granted in pending suit, has not been settled. The cases cited in support of validity, by the opinion, are not strong that way, and neither does it very clearly appear that what is cited the other way contains any very satisfactory ruling. The question seems in the air very greatly, with inclination to uphold these agreements if possible. What is cited from Connecticut seems more direct in opposition to validity than any other case. In New York it would seem the agreement must be called to the court's attention to be deemed valid, or at least free from presumption the other way.

In Pryor v. Pryor, 88 Ark 267, 114 S. W. 214, 129 Am. St. Rep. 102, the validity of an agreement made pending suit for divorce is put upon the ground that: Husband and wife may, when separation has already taken place or is to immediately take place, contract with each other for the payment by him of a sum or sums of money for her support." A very insufficient reason either by way of analogy or otherwise, because there may be no intent to separate unless the bonds of matrimony are dissolved. But, using this rule as a premise, the court says: "Why, then, should not they be permitted to contract for the payment of alimony in contemplation of an immediate divorce? It violates no rule of public policy, for the husband is liable for the wife's support during the continuance of the marriage relation, and it is within the power of the court to grant alimony payable after the relation is dissolved. The agreement was, in effect, contemporaneous with the decree granting the divorce and we see no sound reason nor policy which forbids the making of such a contract." This agreement begs the question from start to finish. It assumes a divorce, like a separation, can be had by agreement, or seems so to do. It further states that the agreement and the decree were, in effect, contemporaneous, when the former antedated the latter and was incorporated in the decree as being something agreed on at a prior time. Further, it is regarded so much as an independent agreement that the opinion denies the right of the court to modify its terms, acording to the rule in such cases. It is hard to find more inconsistency in reasoning than appears in this opinion.

In Palmer v. Fagerlin, 163 Mich. 345, 128 N. W. 207, it was said that: "This court has consistently held, that after actual separation or the launching of a bill for divorce, amicable settlements between the parties, of their property interests, are not only lawful, but are to be commended," citing Randall v. Randall, 37 Mich. 563; Owen v. Yale, 75 Mich. 256, 42 N. W. 817. The former of these cases merely holds that where husband and wife have fully decided to separate, a contract fairly made between them regarding property rights and provision for her support is lawful. There was no question of divorce in the case and they never were divorced, nor so far as appears contemplated being divorced. The other case was a suit for maintenance and the bill did not state a case for divorce, and it is based squarely on the Randall case.

Warren v. Warren, 116 Minn. 458, 133 N. W. 1009, referred to in the instant case, simply states that a stipulation entered into pending action for divorce, provided it is not to facilitate the granting of divorce, is recognized. There seems to be no presumption in this state against a contract made pending an action for divorce for payment of alimony to a wife after divorce.

In Snow v. Gould, 74 Me. 540, 43 Am. Rep. 604, there was no question of arrangements between parties in regard to property, but one regarding the admissibility of evidence in an action by an attorney for his fee in a divorce suit. There was a quotation from 2 Bish. on Mor. and Div., 6th Ed., § 28, as follows: "An agreement between the parties, not involving imposition on the court or a suppression of facts, to facilitate the proofs and smooth the asperities of the litigation, is, though liable to be looked into by the court, no collusion or otherwise objectionable. It may be meritorious."

In Burnett v. Paine, 62 Me. 122, there was question of the validity of notes given by husband pending suit in settlement of alimony. The court said it did not appear that the consideration was that the wife should procure a divorce. "The case seems to be this: The libellant having cause for a divorce, the libellee desired to defend against it only so far as the claim for alimony was concerned. That claim was adjusted by the parties upon terms to be carried into effect provided a divorce was obtained. We can see no impropriety in their doing so. The same thing is often done under the eye of the court. Such questions may well be left for settlement with the parties interested, where they can agree."

In New York the question of the validity of an arrangement for the settling of alimony and property rights contingently upon divorce being procured seems not to have been determined by New York Court of Appeals. The case of Hammerstein v. Equitable Trust Co., 141 N. Y. Supp. 1065, 156 App. Div. 644, says of a particular contract that: "The trust deed or agreement was entirely valid when executed; it was made long subsequent to the commencement of the divorce action, and it took the place of a prior lawful agreement to live apart; and it was to take effect only in case the plaintiff should succeed in obtaining a final judgment severing the bonds of matrimony. Not only that, but it was submitted to the referee and to the court and by the court accepted and acted upon. It relieved the court of the necessity of taking testimony as to alimony and making a specific finding in relation thereto. In matrimonial actions brought in good faith, the parties may relieve the court by agreement, contingent upon the result, of the duty of fixing an amount of alimony. Such an agreement openly made and submitted to the court, is not against the policy of the law, but is in conformity with the general rule which favors ending litigation by agreement where possible. Of course, an agreement based upon promise or understanding to institute an action to dissolve the marriage would be against public policy; as is an agreement to separate made while the parties still live together. But after the fact, simply as a short cut to settling one of the subsidiary issues, there can be no objection to an agreement as to alimony, so submitted."

This case is seen to have much of contingency about it. It carries the idea that there ought to be openness in regard to it—the *imprimatur* of a court upon it—to relieve it from presumption against it, if not indeed to save its very validity. In a former case it was held that a certain arrangement was against public policy, where made pending action for divorce, when it appeared

that its tendency was to stimulate the energies of the wife in bringing about a divorce—she deriving no benefit except divorce be granted. Lake v. Lake, 119 N. Y. Supp. 686, 136 App. Div 47. The fact of no benefit except through divorce seems not a fair test, if the arrangement is but to substitute what is agreed on for that which the court would allow in the event of divorce.

In Ward v. Goodrich, 34 Colo. 369, 82 Pac. 701, 114 Am. St. Rep. 167, an agreement pending suit for divorce for support of wife and children, was upheld, but the agreement seems to have been absolute and not dependent in any way upon decree being granted, the court saying right to divorce for valid reason was reserved to both parties.

In Schmeding v. Doellner, 10 Mo. App. 373, an agreement pending divorce was upheld upon the ground that it was absolute—dependent in no way upon divorce being granted or not granted. It was said: "Any agreement entered into between husband and wife pending a suit for divorce, or in contemplation of such a suit, whose force and effect are in any way made to depend upon the result of the suit, will be held void, because of the motive or inducement which it offers for either a passive consent or an active aid, in promoting the consummation of the divorce. There may be no direct evidence of collusion for that specific purpose. It is sufficient to vitiate the agreement, if it be so framed that, in order to enjoy its benefits a decree must supervene."

In Seeley's Appeal, 56 Conn. 202, 14 Atl. 291, it was said: "Upon the record before us a petition for divorce by the wife was pending. In consideration of a sum of money partly paid in hand partly to be paid when her petition should be granted, she agreed with her husband to refrain from exercising her legal right to ask the court to decree alimony to her. Presumably each party saw in that agreement an individual advantage; to him in that he possibly paid her less than the judgment of the court upon hearing would compel; to her, in that he refrained from answering the allegations of her petition by proof and thus possibly permitted a divorce which he could have prevented. Presumably, too, the result was that the court was left to rest a decree upon evidence which did not include all the facts in the case." The agreement was condemned.

C.

ITEMS OF PROFESSIONAL INTEREST.

LORD HALDANE'S VISIT TO AMERICA, FROM THE ENGLISH STANDPOINT.

While most of the American newspapers have called attention to the unusual and unique distinction conferred on the American Bar Association by reason of Lord Haldane's acceptance of an invitation to visit this country and address the association, we are not sure whether all the people, and many lawyers, have grasped the real significance of this visit.

The English law journals fully appreciate the new precedent, and are moved to make frequent references to it. The Solicitors' Journal (Aug. 30, 1913) says:

"Lord Haldane's visit to America, an innovation from ancient custom which must cause Lord Eldon to turn in his grave, shows how far we have travelled since Henry Brougham took his place on the woolsack in 1830. Until then no Lord Chancellor had ever ventured to leave England, much less travel beyond the sea, and when Brougham went north to Scotland a year or two later the whole legal, social and political world was aghast with horror at his audacity. The King, indeed, was seriously displeased, and is said to have called it "high treason" of the chancellor to carry the Great Seal out of England. Probably William IV. had in mind the notorious Jeffrey's exploit in 1688, when he attempted unsuccessfully to follow his royal master in his flight to France, and threw the Great Seal into the Medway—hoping thereby to dislocate all public business. Certainly Brougham's eccentricities gave the king some cause for annoyance. He took part in undignified games and antics at a Scottish country house; in particular, he contrived to lose the Great Seal, and the ladies who discovered it made him redeem it by a game of blind man's buff in which he was guided by music to a tea-chest where it lay hid. Probably this unhappy escapade it was which led the king, on a reconstruction of the Whig Ministry in 1834, to insist upon the Great Seal being taken from Brougham and vested for some time to come in three lords Commissioners. Lord Haldane, we need hardly say, is scarcely likely to imitate the eccentricities of his famous predecessor.

"A somewhat curious situation, apparently without any constitutional precedent, has arisen from Lord Haldane's journey. He has followed the old practice of placing the Great Seal in commission, but in a novel fashion. The constitution recognizes three possible ways of dealing with the Seal. It may be given to a lord chancellor; it may be placed in the custody of a lord keeper—a common practice in Tudor times; or it may be placed in the keeping of commissioners to execute the office of lord high chancellor. But those are alternatives; when there is a chancellor or a Keeper there are no commissioners; it is when a vacancy occurs on the woolsack that commissioners are appointed. Now Lord Haldane appears to be retaining the office of chancellor while placing the Seal in commission—an arrangement which seems a little difficult to

reconcile with the first section of 1 and 2 William and Mary, cap. 21, which regulates the procedure to be adopted on the appointment of commissioners. Nor is this the only innovation. Ever since 1700, when William and Mary renewed the practice, the commissioners have always been judges, but Lord Haldane has given the Seal to Lord Morley (who is lord president of the Council), Earl Beauchamp (another cabinet minister), and Sir Herbert Cozens-Hardy, the Master of the Rolls —two laymen and one judge. Still another precedent is broken here. For, in former times, whenever the master of rolls has been one of the commissioners he has been the first; this was the case with Sir Joseph Jekyll in 1725, Sir Charles Pepys in 1835, and Lord Langdale in 1850. But in the present case, Lord Morley is named First Commissioner. The point is important, for whereas in all ordinary judicial and administrative matters the commissioners act as a body, it is the first commissioner who appoints and removes officers and exercises the crown patronage—this is provided by section 98 of the Judicature Act, 1873. The explanation for both innovations, we fancy, may be found in the fact that high judicial offices may become vacant this long vacation, as to which the government, for obvious reasons, prefers to retain the power of appointment in the cabinet. Whatever be the reason, these variations from precedent show that Lord Haldane is not disposed to be hidebound by the mere pedantry of legal traditions and etiquette when no public purpose is served thereby.

"To solicitors, especially those who contemplate the issue of writs in the Long Vacation, the most interesting question which arises out of Lord Haldane's novel departure is a very practical one. All writs issuing out of the High Court are witnessed or "tested," to use the technical term, by the Lord Chancellor; they conclude with some such words as these: "Witness, Richard Viscount Haldane of Cloon, Lord High Chancellor, etc." Now how are those writs to be tested while the office is in Commission? When the office of chancellor is vacant and the Seal is not in commission, they are tested in the name of the lord chief justice (Rules of the Supreme Court, ord. 72, r. 3). But when the Seal is in commission it would seem as if they must be tested in the name of all three commissioners. For this seems to follow from the language of 1 William and Mary, cap. 21, which lays down the procedure to be observed when the Seal is in commission. "Whereas several authorities, jurisdictions and powers are by several acts of parliament and otherwise," runs section 1 "vested, settled and placed in the Lord Chancellor of England * * * for the time being. Now for the preventing of all doubts and questions which may arise, whether all or any of those authorities, jurisdictions and powers may be exercised by such commissioners, Be it enacted * * * that such commissioners for the time being may use and exercise at all times according to their commissions * * * all and every the same and like offices, authority, jurisdiction and execution of laws and all other customs, privileges, emoluments and advantages which the lord chancellor * * * for the time being ought to have, use or execute, etc." This section certainly seems to contemplate that the "testing" of writs, which is part of the "execution of laws," should be exercised by the lord commissioners. Possibly the words "according to the commissions" might be read as meaning that different parts of the chancellor's duties and powers in the "execution of laws" might be vested by their commissions of appointment in different commissioners. The point is certainly interesting; but no doubt the officials of the Law Courts have already considered it and decided on the form in which writs shall be tested."

SUMMARY OF PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL CONVENTION OF THE WASHINGTON STATE BAR ASSOCIATION.

By C. W. Shaffer, Secretary.

The twenty-fifth annual session of the Washington Bar Association was held in the City of Seattle, August 7th, 8th, 9th, 10th and 11th. The formal business of the Association was transacted on the 7th and 8th. The rest of the time as well as the evenings of the 7th and 8th being devoted to festivities under the auspices of the Seattle Bar Association. The meetings were held in the Elks' Hall, Alaska Building. Thursday evening a special vaudeville entertainment was given to the Association; Friday evening an auto ride over the boulevards of Seattle; Saturday forenoon, a ride on Lake Washington; Saturday afternoon and evening a trip to the Bremerton Navy Yard and picnic; Sunday a cruise and picnic with the Yacht Club; Sunday night, Monday and Tuesday, a trip to Vancouver, B. C., and return, at which place on Monday afternoon the annual ball game between the Seattle Bar and the Vancouver Bar was played, resulting in a score of seven to one in favor of the Seattle Bar.

President Grosscup's address was devoted

largely to a review of legislation and jurisprudence during the last year, and in addition contained many suggestions for the future reference of the Association. Bishop Frederick W. Keator, of Tacoma, delivered a very entertaining address on "The Leadership of the Bar." Honorable Frank D. Nash delivered an address on "Labor Unions in Ancient Times," showing the strength and influence of these organizations in early history. Judge J. T. Ronald delivered an address on "The Qualifications of a Young Lawyer," and W. O. Chapman on "Delays of Trial Courts." Hamilton Highway, of Seattle, read an address on "First Aid and State Insurance," and F. C. Robertson, of Spokane, gave an address on "The Rights of the Federal Government to Fix the Status of Aliens and their Property Rights in the Various States." Honorable F. F. Garrecht, of Walla Walla, discussed the subject of "Relief of the Supreme Court."

Special addresses were made on the life and character of the late Chief Justice Dunbar: "Dunbar, the Citizen," Ex-United States Senator George Turner, Spokane; "Dunbar, the Man," Supreme Judge Wallace Mount, Olympia; "Dunbar, the Jurist," P. M. Troy, Olympia. A committee was appointed to arrange for memorial exercises in the Supreme Court and, in commemoration of Judge Dunbar, to present to the Court, a painting or sculptural likeness of the late Chief Justice.

In view of the fact that another meeting of the Association will be held before the next session of the Legislature, no definite important recommendations were made.

Officers for the ensuing year were elected as follows: president, Ira P. Englehart, North Yakima; secretary, C. Will Shaffer, Olympia; treasurer, Arthur Remington, Olympia.

BOOK REVIEWS.

M'QUILLIN MUNICIPAL CORPOROATIONS, VOL. V.

This volume of the six volume series now appears and contains fifteen of the fifty-three chapters in the colossal work on this subject. Taxation, finance, fine and police and educational subjects are herein treated, as also other subjects of great importance.

As remarked in other notices of volumes in the series of this journal, the author does not confine his notes merely to citation of cases in support of his text, but he also employs the text thereby by stating the particular operation of cited cases, and where there is any conflict of decision opposing cases are given. The author, therefore, states what he conceives to be the ruling according to the weight of authority.

In the last four chapters of this volume the author tells of actions in various forms against municipal corporations, there being the same exhaustiveness of consideration that stands out through the entire work.

This work is published in law buckram and this volume, like its predecessors, is published by Callaghan & Co., Chicago, 1913.

HUMOR OF THE LAW.

Senator James P. Clark, of Arkansas is not one of the story tellers of the Senate, but he told the following recently with great relish:

One of the best-known judges in my state was hearing a case the last time I went back there and the lawyer for the defendant, to illustrate a point, declared:

"'Your honor, as the Bible tells us, every tub must stand on its own bottom.'

"The learned judge promptly interrupted, informing him that he was no mean Bible scholar and that he was positive the quotation was not to be found in holy writ.

"The lawyer heard him in respectful silence, scratched his head thoughtfully and said:

"'Your honor, you are doubtless right, but I maintain that it's durned good doctrine, and it it isn't in the Bible it ought to be!"

A local attorney, says the Hastings Tribune, laid it over a local statesman in this wise, the statesman paying a fee for the lesson in careful listening and alertness:

The attorney owns lots in the eastern part of the city on which flourishes a luxuriant growth of alfalfa. When the hay was cut and piled in cocks, the statesman drove past, encountering the attorney complacently musing on the edges of the field.

"That yours?" queried the statesman.

"It is my land," the attorney admitted, with pride.

"Put up the hay yourself?" persisted the statesman.

"Not exactly. A man put it up for half."

The statesman scanned the field. "What'll you take for your interest in the hay?"

The attorney thought deeply, closing his eyes in the effort.

"Two dollars," he said.

"Here you are," and the statesman handed over the money, which the attorney pocketed promptly.

The statesman laughed. "You know a lot about hay," he chuckled. "I'd given you $5 quick as two."

"Hay? I didn't sell you any hay. Another fellow bought that."

"Well, what did you sell me then?"

"I don't know; I supposed you did. You offered me $2 for my interest, whatever it is, and you can have it, but I suppose the other fellow will claim the hay. That's what he bought."

Every time the attorney sees the statesman he asks him what the price of hay is, and the statesman, being wise, just considers it a joke and laughs.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attachment**—Third Party.—A third party, owner of goods attached, may maintain trespass against the plaintiff in attachment without alleging malice and want of probable cause.—McCormick v. Tribune-Herald Co., Ga., 78 S. E. 779.

2. **Bankruptcy**—After-Acquired Property.—As Bankr. Act, § 70a, does not give the trustee title to a bankrupt's after-acquired property, crops planted by a bankrupt subsequent to his adjudication are not subject to payment of his debts.—Jackson v. Jetter, Iowa, 142 N. W. 431.

3.——Estoppel.—Where a creditor filed its claim against a bankrupt corporation, and accepted dividends, it was estopped from subsequently suing on the same debt the stockholders as partners, even though it could have maintained such suit before filing its claim.—Swofford Bros. Dry Goods Co. v. Owen, Okla., 133 Pac. 193.

4.——False Pretenses.—A transaction wherein a husband and wife jointly executed notes in settlement of a debt and agreed to procure the indorsement of a person financially responsible, but failed to do so, held not "obtaining property by false pretenses or false representations," where plaintiff retained the old notes and parted with no property or rights in reliance upon the agreement to procure the indorsement; and hence the wife's discharge in bankruptcy released her from liability on the notes.—Rudstrom v. Sheridan, Minn., 142 N. W. 313.

5.——Notice to Creditors.—Notice to creditors of a hearing on application for a bankrupt's discharge and fixing the date should be on order of the judge of the bankruptcy court in accordance with the Supreme Court form 57.—In re Hockman, U. S. D. C., 205 Fed. 330.

6.——Practice.—Where, prior to bankruptcy, claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which it was unsuccessful, it was entitled to file against the bankrupt's estate for its whole claim.—In re Venstrom, U. S. D. C., 205 Fed. 325.

7.——State Courts.—A state court having possession through its receiver of the property of a party subsequently adjudicated a bankrupt would as a matter of course order such property delivered to the trustee in bankruptcy on a motion by the trustee, since the bankrupt law is paramount.—A. H. Alden & Co., v. New York Commercial Co., 142 N. Y. Supp. 772.

8.——Title in Trustee.—Where a buyer of a hop crop at a specified price per pound, to be delivered by the seller at a railroad station, inspected, weighed, and accepted a part of the crop at the buyer's ranch before bankruptcy of the seller, title passed, as to such part of the crop, as against the seller's trustee in bankruptcy.—Williamson v. Richardson, C. C. A., 205 Fed. 245.

9.——Trust Property.—Where a bankrupt held certain real property as trustee for his mother at the time of bankruptcy, and, holding the legal title, might have transferred the same to a bona fide purchaser, such title passed to the trustee in bankruptcy; but, so far as such section was concerned, the trustee took no different title than the bankrupt.—Clark v. Snelling, C. C. A., 205 Fed. 240.

10. **Bills and Notes**—Burden of Proof.—The presumption that the holder of a negotiable note acquired it before maturity could not overcome the inference of his transferror's having been the holder of it at the date of an indorsement on the note made by such transferror.—Levy v. Deposito, La., 62 So. 599.

11.——Notice.—Where there is nothing about a negotiable instrument or its negotiation to excite suspicion, a purchaser, to avoid the imputation of bad faith, need not inquire concerning the execution thereof or the consideration for which it was given, nor need he inquire whether the indorser has performed or will be able to perform his undertaking.—Citizens' Bank v. Stewart, Cal., 133 Pac. 337.

12. **Brokers**—Vendor's Fault.—Where a broker procured a purchaser ready, willing, and able to purchase on the terms specified, but the owner was unable to give a merchantable title, and the prospective purchaser refused to take a defective title, the broker had earned his commission.—Harger v. Watson, Mich., 142 N. W. 352.

13. **Burglary**—Piazza.—As common-law burglary is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony, it is not a burglary for accused to enter the piazza attached to a house, even though the piazza was protected by a balustrade and low picket gates used to keep out dogs and chickens; it not appearing that accused attempted to enter the dwelling proper or attempted to commit any felony therein.—State v. Puckett, S. C., 78 S. E. 737.

14. **Carriers of Goods**—Estoppel.—Where a railroad company's agent promised a shipper to order cars for cattle for a certain day and did not suggest that the cars might not be obtained, the company was estopped to deny that there was a contract to furnish the cars on the day named.—St. Louis & S. F. R. Co. v. Walker, Okla., 133 Pac. 185.

15.——Rates.—The Railroad Commissioners have power to reduce the charges for a particular class or kind of service by carriers if such reduction does not render the carrier unable to earn a fair profit upon its entire business or a reasonable compensation for the service rendered as an entirety.—State v. Florida East Coast Ry. Co., Fla., 62 So. 591.

16. **Carriers of Passengers**—Elevators.—Where there is no evidence as to the acts of the operator of an elevator which, while in good working condition, suddenly moved upward while plaintiff was attempting to enter it and then descended on his foot, it will be presumed, in the absence of an explanation, that the operator was negligent.—Harvey v. Proctor, 142 N. Y. Supp. 769.

17.——Res Ipsa Loquitur.—Proof that a passenger was injured from the derailment of a street car casts upon defendant the burden of proving that the injury was caused without its fault.—Muskogee Electric Traction Co. v. McIntire, Okla., 133 Pac. 213.

18. **Commerce**—Employes' Liability Act.—A hostler in railroad yards dispatching engines, engaged in interstate and intrastate business is not employed in interstate business.—Gray v. Chicago & N. W. Ry. Co., Wis., 142 N. W. 505.

19. **Contempt**—Evading Subpoena.—A witness, who, to evade service of subpoena to be issued, absconds and conceals himself at the request of a brother of one indicted for murder, is guilty of constructive contempt of court.—Aaron v. State, Miss., 62 So. 419.

20. **Contracts**—Acceptance.—An offer of a newspaper of prizes for the contestants receiving the greatest number of votes, a certain number of votes given for each subscription, is not in itself irrevocable, and may be withdrawn at any time before it has been accepted by something being done in reliance upon it, for until acceptance it does not become a contract.—Hertz v. Montgomery Journal Pub. Co., Ala., 62 So. 564.

21.——Forbearance.—An agreement by a creditor to extend the time of payment of a debt for a reasonable time is a sufficient consideration for a contract, since, while the extension must be definite, an extension for a reasonable time is capable of being made definite.—Starr Piano Co. v. Baker, Ala., 62 So. 549.

22.——Good Will.—A seller of the good will of his business may agree to refrain from competing with the buyer within a specified territory for a specified time; and while the buyer continues in the business the seller may not lawfully enter into competition either on his own account or as agent of another, or as a stockholder in a competing corporation.—Knowles v. Jones, Ala., 62 So. 514.

23.——Pari Delicto.—Where the purpose of a contract is to violate the law and the parties are equally cognizant of its nature and equal participants in carrying out its purpose, equity will grant relief to neither party.—Edwards v. Boyle, Okla., 133 Pac. 233.

24.——Restraint of Trade.—The test for determining whether a contract is in reasonable or unreasonable restraint of trade is whether it merely affords a fair protection to the interest of the party in whose favor it is made, without being so broad in its operation as to interfere with the interest of the public.—Georgia Fruit Exchange v. Turnipseed, Ala., 62 So. 542.

25.——Sub-contractors.—Where a contractor assigned to a company all payments to become due him under the contract, and the company agreed to pay therefrom all amounts due sub-contractors and others, the sub-contractors can recover against the company for the amount of their claims.—Bradley v. McDonald, 142 N. Y. Supp. 702.

26. **Corporations**—Directors.—Directors of a corporation must use a reasonable degree of care in the performance of the duties pertaining to their office, and this duty they owe, not only to existing stockholders, but also to those from whom the corporation may solicit subscriptions for stock or securities.—Childs v. White, 142 N. Y. Supp. 732.

27.——Notice.—Where a husband, with knowledge of his wife's mental incapacity and with intent to acquire her property, organized two corporations, which he controlled and of which he was president, to take conveyances from her, they were charged with notice of her incapacity.—Wright v. Clark, 142 N. Y. Supp. 812.

28.——Sale.—The fact that one person owns the controlling interest in both corporations does not make a transfer of all the assets from one company to the other void per se, but it is a circumstance requiring the court to scrutinize the transaction carefully.—Beidenkopf v. Des Moines Life Ins. Co., Iowa, 142 N. W. 434.

29.——Stockholder Liability.—Stockholders are only liable to creditors for debts created while they were stockholders.—Hall v. Hughes, Md., 87 Atl. 387.

30.——Stockholder Liability.—A person in whose name stock of a corporation stands on its books is liable for an assessment under a double liability statute of the state on its insolvency, even though the equitable ownership is in another against whom he may have a right to recover over.—Blackburn v. Irvine, C. C. A., 205 Fed. 217.

31.——Subscription.—Where a person, who signed the original articles of incorporation as a subscriber for stock, acted in the place of a third person, and it was understood that he should not be liable, and before the corporation was authorized to do business he assigned the stock and withdrew from the board of directors, and subsequently substituted articles, signed by the third person and those actually interested, were filed, he was not liable on the subscription.—Campbell v. Raven, Mich., 142 N. W. 355.

32. **Criminal Law**—Opinion Evidence.—Witnesses familiar with a person whose sanity is in question, and who have observed his appearance and demeanor before and after the occurrence which was claimed to have affected his mental condition, may testify to their opinion with reference thereto.—Harris v. State, Ala., 62 So. 477.

33.——Immunity.—An officer who is compelled, by virtue of Code 1906, § 1792, providing that witnesses must testify, though their testimony incriminate them, but no one shall be prosecuted therefor, to disclose before the grand jury his failure to prosecute violations of the liquor law, is immune from prosecution therefor.—Wall v. State, Miss., 62 So. 417.

34. **Damages**—Aggravation.—Where a servant's injury aggravated a prior predisposition to appendicitis, the servant could recover for the direct effect of the injury, notwithstanding, as an incident thereto, the appendicitis might have been aggravated.—Dorn v. Clarke-Woodward Drug Co., Ore., 133 Pac. 351.

35.——Attorney Fees.—Where attorney fees are claimed as damages they must be proved as any other item of damage.—Leon Godchaux Co. v. Di Maggio, La., 62 So. 631.

36.——Growing Crops.—The measure of damages for injuries to growing crops from the casting of overflow waters upon land is their value in the field as they stood at the injury or their value in matured condition less deductions for reasonable expense of maturing and marketing the same.—Brous v. Wabash R. Co., Iowa, 142 N. W. 416.

37. **Death**—Absence Seven Years.—The presumption of death arising from seven years' unexplained absence does not fix the exact time during the seven-year period when the death will be presumed to have occurred.—Carpenter v. Modern Woodmen of America, Iowa, 142 N. W. 411.

38. **Deeds**—Duress.—A quitclaim deed obtained from complainants as a consideration of permitting them to violate the law prohibiting the inclosure of land and a violation of the quarantine regulations was not obtained by duress, menace, or fraud.—Edwards v. Boyle, Okla., 133 Pac. 233.

39.——Undue Influence.—Relations of friendship and social regard between the parties to a deed are not sufficient to create a suspicion of undue influence in procuring it.—Frederic v. Wilkins, Ala., 62 So. 518.

40.——Undue Influence.—That a parent and child resided together when the parent executed a deed to his son which excluded other children from sharing in the father's property would not of itself show undue influence exercised in procuring the deed.—Hawthorne v. Jenkins, Ala., 62 So. 505.

41. **Divorce**—Condonation.—Where, after a breach of marital duty has been condoned, the same misconduct is repeated, the condoned offense is revived.—Penn v. Penn, Okla., 133 Pac. 207.

42.——Constructive Service.—A foreign divorce decree obtained by a husband on constructive notice without the actual knowledge of the wife cannot affect the rights of the wife and children in property located in Oklahoma.—Gooch v Gooch, Okla., 133 Pac. 242.

43. **Evidence**—Res Gestae.—Where the business of testatrix was transacted by third persons by means of letters and cablegrams from one to another, the letters and cablegrams were a part of the res gestae in the matter of the actual transaction of the business.—In re De Laveaga's Estate, Cal., 133 Pac. 307.

44.——Res Gestae.—In an action on an accident policy, where it appeared that insured was shot and killed while with a woman, evidence was admissible as to what decedent and the woman said immediately after the shooting, when others came upon the scene, being res gestae.—Andrews v. United States Casualty Co., Wis., 142 N. W. 487.

45. **Execution**—Manner of Sale.—Where a sheriff at a sale under execution against several pieces of property owned by the judgment debtor, and all heavily incumbered, first offered the property separately and received no bids therefor, it was proper to offer it for sale en masse.—Dickinson v. Johnson, Iowa, 142 N. W. 407.

46. **Executors and Administrators**—Services.—Where a father agreed to compensate his son by leaving his property to him if the son would take care of the father during his declining years, the son may maintain an action on the quantum meruit, even though the father made a will devising the property; it appearing that the will was lost or destroyed, and could not be found after the father's death.—Pool v. Pool, Wyo., 133 Pac. 372.

47. **Fixtures**—Trade Fixture.—The right of a lessee of a tenant for life to remove a trade fixture is not necessarily lost by the mere expiration of the term by the death of the life tenant, but he has a reasonable time after the death of the life tenant to surrender possession and remove the fixture.—Ray v. Young, Iowa, 142 N. W. 393.

48. **Frauds, Statute of**—Oral Contract.—An oral contract for the exchange of land is not taken out of the statute of frauds by the act of one of the parties in paying off a mortgage on his own property, and obtaining an abstract of title for the purpose of performing his part of the contract.—Welch v. Bigger, Idaho, 133 Pac. 381.

49.——Performance After Year.—An unsigned contract, whereby an owner employed another to assist in the operation of a turpentine farm for more than a year, is void within the statute of frauds.—Conoley v. Harrell, Ala., 62 So. 511.

50.——Ratification.—Under the statute of frauds, the ratification of a lease made by an agent without written authority, so as to give it the effect of a term of five years, must be in writing.—Harper & Bro. Co. v. Jackson, Pa., 87 Atl. 430.

51. **Gifts**—Promissory Note.—A note may be the subject of a gift inter vivos and a surrender of the note to the maker with intent to forgive the debt is a sufficient delivery.—Lanham v. Meadows, W. Va., 78 S. E. 750.

52. **Husband and Wife**—Common Law Offense.—At common law, it was not a criminal offense for a husband to leave his wife without the means of support.—Grantland v. State, Ala., 62 So. 470.

53.——Foreign Divorce.—A divorce granted to plaintiff's wife in another state without personal service upon him or appearance by him is not valid as a defense to an action for criminal conversation against one who married the wife subsequent to the divorce.—Berney v. Adriance, 142 N. Y. Supp. 748.

54. **Injunction**—Exclusive Rights.—A water company which has no exclusive right to the use of streets for water pipes cannot have another company, which has authority to lay pipes therein, restrained from doing so, even though special damage thereby results to the former.—New Hartford Water Co. v. Village Water Co., Conn., 87 Atl. 358.

55.——Use of Name.—Where defendants, contrary to contract not to use plaintiff's name continued to use it to the injury of his reputation, plaintiff is entitled to an injunction, having no adequate remedy at law.—George v. Rollins, Mich., 142 N. W. 337.

56. **Insurance**—Accident.—An accident insurance policy, excluding recovery for death from injury "intentionally inflicted" or resulting from any act which, if done by assured while in possession of all mental faculties, would be deemed

intentional or self-inflicted, did not include death by homicide.—Andrews v. United States Casualty Co., Wis., 142 N. W. 487.

57.——Benefit Society.—Suspension of member of benefit insurance society for betraying the secrets of the order, not shown to have been irregular, held to defeat a recovery on the benefit certificate, where the defendant made no effort by appeal or otherwise to obtain reinstatement.—Odd Fellows' Ben. Ass'n v. Ivy, Miss., 62 So. 423.

58.——Concurrent.—A two-story sample room, connected with a hotel and used by guests of the hotel to display their wares, is within a fire policy covering the hotel and additions thereto attached, and subsequent insurance on the sample room alone is within the policy permitting concurrent insurance.—Interstate Fire Ins. Co. v. Nelson, Miss., 62 So. 425.

59.——Estoppel.—Where a fraternal insurance association receipted for papers sent it as proofs of death, and never called for any other showing, it is estopped from defending an action on the ground that it was not furnished the proofs of loss.—Carpenter v. Modern Woodmen of America, Iowa, 142 N. W. 411.

60.——Reformation.—When a policy of insurance does not conform to the contract which it purports to evidence, and the insured accepts the policy in the belief that it does conform, equity will reform the instrument.—Fidelity Phenix Fire Ins. Co. v. Hilliard, Fla., 62 So. 585.

61. **Interest**—Interest on Interest.—Past-due interest on a note, which stipulates that interest shall be paid annually, is a liquidated demand, which itself bears interest.—Butler v. First Nat. Bank of Greenville, Tenn., Ga., 78 S. E. 772.

62.——Liquidated Sum.—Interest, though not stipulated for, is recoverable as an invariable legal incident of the principal debt from the day of default, whenever the debtor knows precisely what he is to pay and when he is to pay it.—Bright v. James, R. I., 87 Atl. 316.

63. **Joint Tenancy**—Trespass.—An extraction by one joint tenant of oil without consent of his co-tenant constitutes waste and is a trespass for which he is liable to account to his cotenant.—South Penn Oil Co. v. Haught, W. Va., 78 S. E. 759.

64. **Landlord and Tenant**—Abandonment.—Where a tenant, not under compulsion, but voluntarily, abandons the premises, there is no eviction.—Harper & Bro. Co. v. Jackson, Pa., 87 Atl. 430.

65.——Latent Defect.—A landlord who covenanted to repair is liable in tort for personal injuries to a member of the tenant's family only when they were caused by a latent defect which he fraudulently concealed from the tenant at the time of leasing.—Anderson v. Robinson, Ala., 62 So. 512.

66.——Partial Eviction.—A partial eviction is as effective a defense to an action for rent as an entire eviction.—Roll v. Howell, Ala., 62 So. 463.

67.——Tenancy Implied.—A tenancy from month to month may be created by an agreement to that effect by a lease for an indefinite term reserving a monthly rental or it may be implied from the manner in which the rent is paid.—Proskey v. Colonial Hotel Co., Nev., 133 Pac. 390.

68. **Libel and Slander**—Weight of Evidence.—Since an action for slander in stating that plaintiff was a "common woman," etc., partakes of the nature of a criminal accusation, the preponderance of the proof required to make out a case should be somewhat more than in ordinary civil actions.—D'Echaux v. D'Echaux, La., 62 So. 597.

69. **Limitation of Actions**—Cestui Que Trust.—The statute of limitations does not run against an action by the cestui que trust after becoming of age until she has notice that the trustee denies her right to the property.—Goodman v. Smith, Neb., 142 N. W. 521.

70. **Malicious Prosecution**—Instructions.—In an action for malicious prosecution, it was reversible error to charge that plaintiff's discharge in such prosecution was prima facie evidence of want of probable cause.—Prine v. Singer Sewing Mach. Co., Mich., 142 N. W. 377.

71. **Master and Servant**—Absorption in Work.—A servant whose attention is diverted as by his work is not bound to observe the same close attention as he otherwise would.—Wheeler v. Sioux Paving Brick Co., Iowa, 142 N. W. 400.

72.——Assumption of Risk.—The mere fact that an employee continuing to work in reliance on an assurance of safety by the employer, or his representative, apprehended the possibility of injury does not as a matter of law charge him with assumption of risk involved in the work.—Randall v. F. W. Abbott Co., Me., 87 Atl. 376.

73.——Extraordinary Risk.—Negligence of the master enhancing the servant's ordinary risk and contributing some added hazard to his position transforms his risk from an ordinary risk into an "extraordinary risk."—Tenney v. Baird Mach. Co., Conn., 87 Atl. 352.

74.——Fellow-Servant.—Where the common-law doctrine of fellow-servant has not been abrogated or modified, the master is not liable for injury to a servant from fellow servants in the performance of some mere detail of the common employment not involving a non-delegable duty of the master.—Kreps v. Brady, Okla., 133 Pac. 216.

75.——Hospital Service.—A corporation which establishes hospitals and undertakes to furnish treatment to injured and sick employees for a part of the wages of the employees does not maintain a charity but stands in no different light from the ordinary physician.—Kain v. Arizona Copper Co., Ariz., 133 Pac. 412.

76.——Misadventure.—If a servant's injuries are the result of accident or misadventure, he cannot recover.—McNeil v. Munson S. S. Line, Ala., 62 So. 459.

77.——Safe Place.—Where the place at which plaintiff was working was safe when he was put there, and subsequently became unsafe, not from any inherent danger obvious to him, but as the result of the foreman's sending another employee above to saw off a block without any warning to plaintiff or any knowledge on his part that such work was being done, plaintiff did not assume the risk.—Alabama Great Southern R. Co. v. Neal, Ala., 62 So. 554.

78.——Volunteer.—Acting in an emergency to remedy a condition required to be remedied before the work can proceed does not make the employee a volunteer, unless the work was another's special duty.—Wheeler v. Sioux Paving Brick Co., Iowa, 142 N. W. 400.

79. **Mechanics' Liens**—Estoppel.—Where a materialman received an undated check from the principal contractor and agree not to cash it until he received notice from the contractor of a deposit to meet the same, but violated such agreement by filling out the date and presenting the check for payment after the contractor had deposited an amount received from the owner for application in a specified manner, such materialman could not, on applying the proceeds of such check on another debt, enforce a lien on the building without giving credit for the amount received on such check.—Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co., Neb., 142 N. W. 519.

80.——Merger.—Though a mechanics' lien, when filed, attached only to a leasehold estate, it is enforceable against the fee after the leasehold had been merged therein by the acts of the landlord.—Harte v. Shukert, Neb., 142 N. W. 517.

81. **Mines and Minerals**—Exploration.—A grant of oil and gas is a grant only of such part as the grantee may find, and passes nothing but the right to explore.—Rives v. Gulf Refining Co. of Louisiana, La., 62 So. 623.

82. **Money Paid**—Action for.—An action for money paid does not lie except on a request, express or implied, on the part of defendant or his authorized agent.—Oliver v. Camp, Ala., 62 So. 469.

83. **Monopolies**—Patentees.—That a patentee by putting his invention to use, has become entitled to a monopoly in its manufacture and sale, and that his competitors therein in interstate commerce are infringers, does not give him the right under the patent laws to resort to methods of unfair competition to force the competitors out of business, and such action, pursuant to a conspiracy or combination, is in

violation of the Anti-Trust Act.—United States v. Patterson, U. S. D. C., 205 Fed. 292.

84. **Mortgages**—Redemption.—A right to redeem lands from a mortgage may be lost by laches and acquiescence of the plaintiff and adverse possession by the defendant.—Drumright v. Aitchison, Fla., 62 So. 594.

85. **Municipal Corporations**—Repair of Streets.—It is competent for the legislature to limit the liability of a city for its failure to keep its streets in a reasonably safe condition.—City of Bessemer v. Whaley, Ala., 62 So. 473.

86. **Parent and Child**—Undue Influence.—It is always presumed that in transactions between parent and child the parent dominates and is free from undue influence, and the burden is on one seeking to show undue influence by the child to overcome such presumption.—Hawthorne v. Jenkins, Ala., 62 So. 505.

87. **Partnership**—Implied Powers.—Among the implied powers of a member of a trading firm is the authority to employ servants to carry on the partnership business and such as may be necessary in winding it up.—Lichenstein v. Murphree, Ala., 62 So. 444.

88.——Presumption of.—A partnership is a contract, express or implied, between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in business, and to divide the profits and bear the losses in certain proportion.—Kent v. Cobb, Colo., 133 Pac. 424.

89. **Patents**—Cloud on Title.—A court of equity has jurisdiction to remove a cloud on title to patent rights, though the same is personal property, and to cancel a contract creating the cloud.—O'Donnell v. Brown, R. I., 87 Atl. 311.

90. **Pledges**—Defined.—A pledge is a transfer of personal property as security for a debt; the three essentials being that the possession must pass to the pledgee, that the legal title must remain in the pledgor, and that the pledgee must have a lien for the payment of a debt.—Rolfe v. Huntsville Lumber Co., Ala., 62 So. 537.

91. **Principal and Agent**—Authority of Agent.—A principal could not enforce a contract against a party induced to sign it by his agent's representations as to the character of the instrument, although such representations were not authorized by the principal.—Dunston Lithograph Co. v. Borgo, N. J., 87 Atl. 334.

92.——Sole Agency.—Where plaintiff agreed to appoint defendant its sole agent in a certain place for the sale of its products and no time for the agency was fixed, plaintiff might revoke the agency at the end of a reasonable time, even if defendant had expended money in advertising the product.—Ewart Lumber Co. v. American Cement Plaster Co., Ala., 62 So. 560.

93. **Names**—Idem Sonans.—J. Van Smith, as defendant was named in an indictment, was not idem sonans with Javan J. Smith; the initials not being regarded in considering the plea in abatement.—Smith v. State, Ala., 62 So. 575.

94. **Navigable Waters**—Property in Ice.—Ice formed upon public waters can only be appropriated when the ice is fairly merchantable; and when the appropriator has a present intention and ability to at once harvest it, and proceeds to do so with reasonable diligence, and a right of appropriation cannot be acquired by staking the banks of a stream before it has frozen.—Hudson River Ice Co. v. Brady, 142 N. Y. Supp. 819.

95. **Quieting Title**—Burden of Proof.—Where in a suit to quiet title, each party claims to be the owner, the burden is on each to establish by evidence his affirmative averments touching his own title.—Durkin v. Ward, Ore., 133 Pac. 345.

96. **Railroads**—Common Law Duty.—It is the common-law duty of a railway company to bridge its tracks at street crossings, when reasonably necessary for public safety and convenience.—State v. Chicago, M. & St. P. Ry. Co., Minn., 142 N. W. 312.

97. **Rape**—Corroboration.—On a trial for rape, the prosecuting witness must be corroborated as to every essential element of the crime, and not merely as to the commission of the crime by someone, but also as to its commission by accused.—People v. Shaw, 142 N. Y. Supp. 782.

98.——Intent.—The guilty intent of accused charged with assault with intent to rape may be inferentially drawn from the use of force, and the mere fact that he abandoned his purpose after violently putting his hands forcibly on the prosecutrix with intent to ravish her does not relieve him from criminal responsibility.—Brooks v. States, Ala., 62 So. 569.

99. **Sales**—Executory.—Every agreement for a subsequent delivery is essentially executory, and there is a broad distinction between a sale which transfers the ownership, and an agreement to sell and deliver at a day certain, giving but an action for breach.—Rolfe v. Huntsville Lumber Co., Ala., 62 So. 537.

100. **Telegraphs and Telephones**—Stipulations.—Where stipulations on the back of blank forms furnished by a telegraph company to its customers for messages are void as against the public policy of the state where a message originates, they may not be relied on in the state to which the message is sent.—M. M. Stone & Co. v. Postal Telegraph Cable Co., R. I., 87 Atl. 319.

101. **Trover and Conversion**—Detention.—A mere detention of another's chattels, which rightfully came into plaintiff's possession, is not a conversion, unless based upon a negation of the owner's right, or accompanied by an intent to convert the property.—Whiting v. Whiting, Me., 87 Atl. 381.

102. **Trusts**—Resulting Trust.—Where property of an infant is sold and the proceeds invested in other property, and the title taken in the name of a friend, a resulting trust arises in favor of the infant.—Goodman v. Smith, Neb., 142 N. W. 521.

103.——Revocation.—Where a woman conveyed property in trust to receive the proceeds during her life, remainder to be paid according to her appointments by will, or, in the absence of will, to go to her heirs at law, the trust is irrevocable except by her last will and testament.—Wright v. Clark, 142 N. Y. Supp. 812.

104. **Vendor and Purchaser**—Assumption of Debt.—Where a vendor repurchasing from her vendee assumed the payment of his note to her, but did not give a mortgage to secure it, a vendor's privilege resulted by operation of law from her assumption of the debt.—Levy v. Deposito, La., 62 So. 599.

105. **Waters and Water Courses**—Natural Stream.—A water course is a natural stream of water usually flowing in a definite channel, having a bed and sides, or banks, and discharging itself into some other stream, but it is not necessary that its origin be exclusively natural, and it is sufficient, if it be partially artificial, if it becomes a living, flowing stream of water.—Falcon v. Boyer, Iowa, 142 N. W. 427.

106.——Prior Appropriation.—A prior appropriation does not confer upon the appropriator an absolute right to the body of water diverted from the stream, and he cannot allow it to run waste, and prevent others from using it, when it is not necessary for the purposes of his appropriation.—Claypool v. O'Neill, Ore., 133 Pac. 349.

107.——Riparian Owner.—The owner of land through which runs a stream which is not navigable nor a meandered stream owns the bed of the stream, and has the right to have the water flow from his land in its natural channel without obstruction.—Watt v. Robbins, Iowa, 142 N. W. 387.

108. **Wills**—Holographic.—In respect to holographic wills, the rule as to the method of publication is not so severe as where the will is drawn by a scrivener; and where testator wrote his own will and at different times on the same day showed it to attesting witnesses separately, who each signed in his presence, there was a legal attestation.—In re Levengston's Will, 142 N. Y. Supp. 829.

109.——Specific Legacy.—A specific legacy is generally revoked by a sale or change of the form of the thing bequeathed.—Spinney v. Eaton, Me., 87 Atl. 378.

110.——Testamentary Capacity.—One may be mentally incompetent to make a will by reason of a want of development of the mental faculties though he is not a lunatic nor an idiot nor possessed by delusions.—In re De Laveaga's Estate, Cal., 133 Pac. 307.